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A JURISPRUDENCE OF FAITH: AN EXPERIMENT IN USING THEOLOGY TO INTERPRET JURISPRUDENCE†

TIMOTHY L. FORT*

Many Americans become uneasy when others try to impose a religious orientation on government. The assumption that church and state are separate is so pervasive that attempts to associate the two are viewed suspiciously. However, American law and government have never been separate from religion, and probably never will be. While church and state may be separate, religion and state are not. In particular, religion and jurisprudence are so related that to understand American legal history, one must understand American religion. This Article will focus on a significant time in Connecticut history that exposed how jurisprudence remained subject to the influences of religion even after the supposed separation of church and state. The Article is not designed to be an exhaustive exposition on the religious character of American jurisprudence, but it is an experiment created to introduce new analytical categories of interpretation.

In attempting to discern the effect that religion had in the development of American jurisprudence, modern scholars have measured religious influence by either tallying the number of religious laws enacted by the legislature, or by dismissing such studies by saying that a law was enacted simply because of the power of the church. By concentrating on these end products, however, these academics failed to realize that religion is a way of life, not simply an ethical and liturgical code. For exam-

† This article is part of a book being published by McFarland (1986).

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ple, William Nelson noted that the most significant development in America from 1760 to 1830 was the eradication of established state churches and the emergence of new religious diversity.¹ His analysis was based on an exhaustive compilation of "religious" laws, specifically criminal laws, defamation, laws protecting religion, and personal morality laws. Although Nelson realized the strong religious nature of early American law, his analysis stopped short of really understanding the religious/legal nexus. But it was not, as Nelson thought, that the influence of religion declined after 1830, rather it was that the language and nature of religion changed so that the force of its influence could not be measured by its traditional, institutional, and political manifestations. The church and Puritan legislation were merely convenient and visible benchmarks of a far deeper, more pervasive religious ethos. In order to achieve a proper understanding of what the church and religious legislation were about, one must realize the total religious nature of the individuals dominating the churches and the legislatures. In short, modern analysis focusing on laws and churches completely misses the spiritual nature of American jurisprudence.

Even when scholars have attempted to integrate notions of religion and law, usually at least one of the disciplines has been misunderstood. For instance, Lon Fuller attempted to distinguish between the morality of duty and aspiration, so that he could develop base-line notions of what characteristics law must have in order to be moral. While the distinction between duty and aspiration is common, in articulating the distinction, Fuller blithely asserted that the Ten Commandments and the Old Testament merely were concerned with the "basic requirements of social living."² In other words, the theology of the Decalogue, couched in "Thou shalt not" terms is exemplary of moral duty, not of aspiration to a perfected being. Such an assertion ignores several very strong theological interpretations such as one presented by Martin Luther, who said that the Old Testament was not merely a set of rules, but a way of life whose requirements were so impossible to reach that God sent Jesus Christ to earth to relieve men. The Decalogue was not simply the "basic requirements" but a call for men to learn what good was and to teach them that however noble they may be, they could not reach that good.³ One may disagree with Luther's understanding of the Old Testament, but Fuller's acceptance of the popular idea that the Decalogue was minimalistic is symptomatic of a far greater difficulty inherent in interweaving religious and legal notions; namely, that shorthand classifications lead to inaccu-

¹ W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 2 (1975).

² L. FULLER, *THE MORALITY OF LAW* 6 (1964).

³ See MARTIN LUTHER, *THE FREEDOM OF A CHRISTIAN* 282 (W.A. Lambert trans.), rev. in H. GRIMES, *MARTIN LUTHER: THREE TREATISES* (1943).

rate analysis.

There are two ways to escape this difficulty. A writer may become either fully versed in both disciplines, a task that often would fail to appreciate an individual's particular religion, or may look explicitly at what religion means to a particular person who also was involved in law making.

One scholar who has begun to do some of this latter type of analysis is Stephen Presser. Presser described his approach as belonging to the "heroic school" of legal history, a school that focuses on individual men and examines their jurisprudential contributions as a product of their personalities. Presser recognizes that "man is after more than mere economic survival, and they (heroic school historians) study legal man as he searches for spiritual as well as temporal salvation."⁴ Presser applied this methodology particularly effectively in an article on New Jersey Federal Judge John Thompson Nixon.⁵ Presser interpreted part of Nixon's jurisprudence as an outgrowth of his intense and active Presbyterian faith, particularly Nixon's acceptance of the doctrine of predestination. While a religious analysis of a jurist's faith must be developed beyond that of a single doctrine, Presser is correct in identifying the usefulness of religion in understanding jurisprudence.

This Article attempts to broaden the term "religious" beyond the limits that modern legal historians have imposed upon it. Religion cannot be understood simply by looking at ethics, church membership, or political alliances of church and state. Religion must be understood in its truer form, as a way of life. In its broadest and simplest form, this Article asks what was the judge's way of life. Because of the nature of Connecticut prior to 1860, this question resolves itself into a question of the content of the judge's Christianity, and how that way of life shaped his jurisprudence.

The second theme is to show that Connecticut was an unfolding natural law tradition. To understand this, one needs to understand something about the political form of Christian natural law. Jacques Ellul, in *The Theological Foundation of Law*⁶ outlines four states in the development and erosion of natural law. He states that in its origin, law is an expression of the will of God as formulated by priests and that is sanctioned by some type of ritual. The precepts of the religion are presented in juridical garb. In this stage, there is absolutely no distinction between law and religion.

⁴ Presser, "Legal History" or the History of Law: A Primer on Bringing the Law's Past Into the Present, 35 VAND. L. REV. 849, 866 (1982).

⁵ Presser, "Judicial Ajax:" John Thompson and the Federal Courts of New Jersey in the Late Nineteenth Century, 76 NW. U.L. REV. 423 (1981).

⁶ J. ELLUL, THE THEOLOGICAL FOUNDATION OF LAW 5 (1960).

Gradually, however, the law becomes secular as the religious elements differentiate from the juridical and moral law. The state becomes somewhat different from religion. Ellul says that at this point, natural law begins. The natural law is established by custom and legislation which is independent of religious power. The natural law spontaneously arises from the common sentiment of the people; it is not dictated by a power such as the church or the state. Law is an expression of the people's consciences. In other words, law is part of a way of life in both stages one and two, but in stage one, the law is identified with the traditional and institutional manifestations of religion: churches and priests. In stage two the way of life is broadened beyond the traditional and institutional; it is religion in a new language. In the third stage, the natural law is articulated as part of a theory. At this moment, man ceases to be spontaneously within the law, but instead places himself outside of the law to explain it rationally. The law is then the object of interpretation rather than simply an accepted way of life. A key element of this stage is that the jurist seeks to organize and systematize the law in a rational fashion.

Connecticut was poised between stages two and three. Prior to 1790 in Connecticut, law was simply the Puritan way of life. The law was established by custom and legislation as a result of political, economic, and moral factors of the time. The established state church did not dictate the law, but the Puritan faith was so ingrained in each person, that it was impossible for one to place himself outside of the Puritan way of life. However, this way of life was stable because of the unity of the people in the Puritan faith, a unity that was shattered by the Great Awakening of 1740. Those revivals drove conservative Congregationalists to the Methodist and Baptist churches and moderate Congregationalists to the Episcopal church, resulting in the diversification of group conscientiousness. Without a unified conscience, Connecticut law was pushed toward stage three, the systematic elaboration of the law. Connecticut only moved toward stage three however, it did not fully enter it.

Connecticut judges such as Zephania Swift and Tapping Reeve strove to articulate the law rationally and later justices followed their systematizing approach. Despite this rational technique, jurisprudence remained within the bounds of Christian thought. Religious preoccupation remained a way of life, and Connecticut was still guided by natural law as it was interpreted in a systematically Calvinist manner. Thus the second theme of the Article is that Connecticut moved from a natural law society toward a scientific law society because of the religious diversity spawned by the Great Awakening.

While the focus of this Article relates to Ellul's second and third stages as applied to Connecticut, his fourth stage is enlightening for a general consideration of American legal history. In stage four, the state itself settles the problem of correct interpretation of the law by positively

articulating the law. In this stage, central principles are pronounced, and juridical technique becomes increasingly precise and rational. Law hardens into rigid classifications since it is removed from societal spontaneity. Law loses its normative value and simply becomes a game. As a game, juridical technique can be influenced by whomever has power, usually a manipulation working through the state. When natural law has thus been negated, the people will not follow the law spontaneously, since the new law simply is imposed and is not a way of life. This manipulative law needs to be enforced by the state. Attempts to revive the natural law are doomed to failure because natural law arises; it cannot be artificially or consciously revived.⁷

The malleability of this new law is consonant with much of the economic legal analysis written by Morton Horowitz and the radical transformationist school of economic legal analysis as well as by members of the Wisconsin school of economic legal analysis.⁸ Once law becomes rational, the forces of economics increase in power and influence. Hence, while the modern emphasis upon economic analysis of nineteenth century law is justified, it is important to remember that economics also was changing the perspective and language of religion. Religion adapted to the changing culture and thereby contributed to, if not defined primarily the substance of, scientific jurisprudence.

For this Article, the primary way to understand the religious nature is to study two Chief Justices of the Connecticut Supreme Court of Errors. Zephania Swift and Tapping Reeve were giants in transforming Connecticut jurisprudence and, not so coincidentally, they served as Chief Justices during Connecticut's crucial decade of 1810 to 1820. Neither jurist hesitated to express his theology. Before turning to each one, however, a short description of Connecticut is needed to frame the context in which these judges worked.

I HISTORICAL BACKGROUND

A) *Early Connecticut History*

The first settlers in Connecticut were Puritans who emigrated from Massachusetts in 1636. Within a short time, Connecticut adopted the first modern constitution in the United States, the Connecticut Fundamental Orders. Reverend Thomas Hooker, the most prominent personality in Connecticut, provided the substantive theory for the 1639 Constitution in a sermon given at the General Court on May 31, 1638.⁹

⁷ *Id.* at 31-35.

⁸ For an excellent systemization of schools of modern legal historical perspectives, see Presser, *supra* note 4, at 849.

⁹ A JUDICIAL AND CIVIL HISTORY OF CONNECTICUT 9 (D. Loomis & J. Calhoun ed. 1895). [Her-

Hooker's sermon contained three main doctrines. First, it was God's decision to allow people to choose their ruling magistrates. Second, the enfranchised voters were to elect the magistrates according to what the people believed to be the will of God. Voting was not based on what the candidate could do for the individual voter, but on what the candidate could do for God. Third, the people were to restrain the power of the incumbent magistrates. Election was not authority for the monarchy or episcopacy. Underlying Hooker's doctrines was his explicit belief that people would be more inclined to love officers and obey these officials if the people freely elected them.¹⁰

Hooker's sermon illuminates the theological character of Connecticut civilization. Hooker, like John Calvin, stressed that God was not an aloof, disinterested being, but was an active participant in government. The entire political process was focused on maximizing God's glory. This governmental focus on God accentuated the need for all of society to have a consistent understanding of God's nature. As long as Connecticut enjoyed theological homogeneity, their theocentric government functioned effectively. This orientation also left Connecticut vulnerable to religious diversity, since diverse notions of God would directly attack the entire governmental structure.

The Fundamental Orders created a simple, but effective government that remained intact until the Connecticut Constitution of 1818. Written by a close friend of Hooker, Roger Ludlow, the Fundamental Orders provided for the election of six magistrates, who with a governor were to rule according to the will of God. Towns elected individual representatives who assisted these seven men and together they were known as the General Court, which possessed all judicial, legislative, and executive authority. In 1662, England recognized the provisions of the Fundamental Orders when it used them as the basis for granting Connecticut a charter that would remain Connecticut's official government document until the 1818 Constitution.

The Connecticut magistrates quickly recognized the necessity of delegating powers to inferior courts. By 1638, the General Court was appointing "assistants" to the judicially-oriented courts and made the local county courts extensions of its authority.¹¹ The lower courts mediated between persons, hearing civil cases that mainly dealt with property and probate issues. Debt actions were popular because they were inexpensive and because the lower court was often the only available forum in which the parties could bind their agreements. The lower courts also attracted a

inafter cited as *CIVIL HISTORY IN CONNECTICUT*].

¹⁰ JONES, *CONGREGATIONAL COMMONWEALTH, CONNECTICUT, 1636-1662*, at 70-71 (1981).

¹¹ See E. GOODWIN, *THE MAGISTRACY REDISCOVERED: CONNECTICUT 1636-1818*, at 37-45 (1981).

great number of personal morality cases, which came in two groups. The first group consisted of prosecutions of offenses such as drunkenness, vulgarity, and sexual crimes. The second group concerned such allegations against personal character as slander and defamation.¹²

There were several good reasons for the numerous cases.¹³ First, the court was a God-given method of dispute resolution. The Puritans would not have hesitated to turn to a divine blessing like the court to settle societal problems. Second, "personal morality" cases were not simply a secular affront, but a crucial religious issue. A person's piety was a sign of predestined salvific election. A slanderous remark directed against a person's reputation could call one's piety into doubt if the charge was left unmet. Thus, a slanderous statement actually could challenge the reality of one's eternal destiny. Such an offense was not a question of personal affront, but of one's eternal self-understanding. Thus, legal courts originally were based upon and concerned with issues that did not differentiate between secularity and sacredness.

B) Religious Development

In the one hundred years following the adoption of the Fundamental Orders, Puritan piety diminished. When this weakened piety was confronted with the increasing political, economic, and social complexity of the mid-1700s, the Great Awakening resulted. The Awakening, which exploded in 1740, was a religious revivalist movement that spread throughout most of the thirteen colonies and was particularly intense in New England. It shattered the religious unity of Connecticut. In its wake, the Great Awakening left a religiously diverse population that would not tolerate the presence of an established church and that challenged the religious basis for the governance and jurisprudence of Connecticut. Before the Awakening, Connecticut was almost entirely Congregational; by 1776, one-third of the population had left the Congregational church.¹⁴

The revivals were a Calvinist reassertion of the sovereignty of God and the depravity of man. The revivals fiercely objected to any diminution of man's duty to conduct a pious life and to any attempt to conceptualize man as enlightened. They emphasized the emotional conversion experience instead of professions of faith.¹⁵ They were thought to be caused solely by an outpouring of God's spirit, so that the more emotional one became at a revival, the more deeply one had been touched by the

¹² *Id.* at 39-49.

¹³ Goodwin states that the numerous cases illustrate that there was a troublesome class of people in Connecticut and that the Puritans themselves had disagreements.

¹⁴ A. STOKES, CHURCH AND STATE IN THE UNITED STATES, 410 (1975).

¹⁵ C. GOEN, REVIVALISM AND SEPARATISM IN NEW ENGLAND 13 (1962).

Holy Spirit.¹⁶ They emphasized the participation of laity and the voluntary performance of moral acts. Attempts to enforce morality were disparaged.¹⁷ Those who separated from the Congregational church distrusted the Puritans because the Puritans were trying to enforce a diluted piety.

Because of the Great Awakening, there was no longer the religious homogeneity that had been the backbone of Connecticut government since its founding. Many moderate Congregationalists, fearing that their church might become ultraconservative, became Anglican and thus shaped the Anglican church into a Calvinist mold, while Baptist and Methodist congregations swelled, particularly in the rural areas.¹⁸ Thus, it became much harder to view the members of the Assembly and the judges as expositors of God's will, since the methods of discovering God's will had changed. Diversity forced political and judicial institutions to find new methods of gaining and maintaining consensus and legitimacy. Connecticut moved toward a new state, in which jurists rationally attempted to synthesize and systematize the old natural law. That new approach was the rational, scientific approach of Tapping Reeve and Zephania Swift.

C) *Connecticut History 1790 - 1820*

The years 1790 to 1820 were years of political revolution and religious turbulence. Significant political forces triggered the adoption of a new constitution in 1818 replacing the Charter of 1662 as the governing document of the state. There were two basic reasons for the adoption of a new constitution, both were based on religious motives.

First, there was the desire for religious liberty among Episcopalians, Methodists, and Baptists, who hated the certificate. The certificate allowed one to worship in his own church without having to pay taxes that supported the established Congregational Church. To receive the certificate, one had to apply directly to the legislature. The certificate allowed the Federalists/Congregationalists to claim that Connecticut enjoyed religious freedom, but the dissenters found the tedious requirement of applying to the legislature an obnoxious limitation on religious liberty.¹⁹ The politically astute state Republicans made the disestablishment of the Congregational Church and religious liberty primary party platforms and thereby snared the political allegiances of most of these religious

¹⁶ E. GAUSTAD, *THE GREAT AWAKENING* 16.

¹⁷ *Id.* at 110.

¹⁸ *Id.* at 117-120.

¹⁹ R. PURCELL, *CONNECTICUT IN TRANSITION: 1775-1818*, at 61-62 (1963).

dissenters.²⁰

The second cause for the drive for the new constitution was the influence of the French Revolution. The Revolution stimulated the existing roots of religious discontent and also encouraged deism. The Great Awakening already had caused a deep religious split in Connecticut, and in the French-Indian War and the American Revolution, theologically vulnerable American soldiers were exposed to European deism and rationalism. Rationalism spurred a desire for Connecticut to erect a government with a new constitution. The deistic movement in the United States was spearheaded by Joseph Priestly, Ethan Allen, Thomas Paine, and Thomas Jefferson.

When the Connecticut Republicans criticized the Connecticut clergy, the Federalists quickly branded them as Jeffersonian, amoral deists. To the Federalist mind, any attack of the Congregational clergy was an attack on God. The Connecticut Federalists did not understand that the religious dissenters were Republican because that was the only way they could achieve religious freedom. The degree to which the political struggle was religiously-based is revealed by Timothy Dwight's characterization of the Republicans as sabbath-breakers, profane swearers, attenders of amusements and balls, drunkards and gamblers.²¹

While several issues dominated the political scene from 1810-1820, the final incident that led to the Constitution was the problem of the distribution of war funds. Fourteen thousand dollars were owed to Connecticut for its share of expenses of the War of 1812. In 1816, Connecticut received and distributed the money to the religious societies: one-third went to the Congregational Church, one-seventh went to the Bishop's Fund (Episcopal), one-twelfth went to the Methodist Church, one-eighth went to the Baptist Church, one-seventh went to Yale, and the remainder went into the state treasury.²² The allocation angered everybody. The Congregationalists felt that they deserved more, and the other sects felt that the Congregationalists had been unfairly benefitted. This inflamed the religious pluralism problem even more.

The 1817 election focused on church-state separation, religious tests for office, secret handling of state finances, taxation, and the Hartford Convention.²³ None of these issues were particularly favorable to the Federalists. The result was that the Republicans who also were (significantly) known as the Tolerationists, won the 1817 gubernatorial election by six

²⁰ See *id.* at 217.

²¹ See C. KELLER, *THE SECOND GREAT AWAKENING IN CONNECTICUT*, 13-24 (1968).

²² 3 R. PARKER, *COURTS AND LAWYERS OF NEW ENGLAND* 627 (1971).

²³ The Hartford Convention was held in 1814. It almost led to the secession of Connecticut and Massachusetts from the Union and was quickly branded a traitorous gathering.

hundred votes, and won control of the General Assembly.²⁴

The 1818 Convention generally was composed of religiously tolerant delegates. It was a non-partisan meeting since the Federalists went along with the Republican reforms. The three major innovations in the new constitution were that religious toleration was granted to all Christians, the government was divided into three branches, and the Congregational Church was disestablished.²⁵ While the political resolution of religious pluralism was the constitution, Connecticut turned to a familiar movement, the revival, for the religious solution.

From 1800-1830, Connecticut experienced an almost continuous state of revivalism that emphasized humanitarian activity. While Calvinism had always encouraged ethical responsibility, these revivals differed in that the activity was geared toward the development of the social good. The revivals cut across denominational lines and sparked formation of missionary societies, Bible, tract, and educational societies, Sunday schools, and other societies for moral reform.²⁶ The Connecticut Bible Society was founded in 1811 to send bibles to the western frontier. The Connecticut Society for the Promotion of Good Morals was founded to further "moral" sermons and inveighed against interpermanency. The Domestic Mission Society for Connecticut and Vicinity was founded to build up "waste places" and the New England Tract Society established a school for the deaf and dumb.²⁷

The theological focus of the revivals, as in Calvinism and the Great Awakening, was the grace and power of God, and the need for human submission to the will of God. These revivals, however, added two significant innovative thoughts to Calvinism: the value of the individual, and the social responsibility of the church. The church was no longer to serve merely as a place for the gathering of the elect, rather it was to be concerned about the common good. The individual was no longer depraved, rather he had some intrinsic worth. This new shift deemphasized the doctrines of election and predestination; man had responsibilities and control over his ultimate destiny.²⁸ Man was no longer simply a pawn in supernatural hands.

The humanitarian emphasis was able to cut through denominational divisions. It was easier to build consensus about the rights of sending Bibles to the west than it was to determine the nature of original sin. The emphasis on humanitarianism entailed a higher understanding of the na-

²⁴ R. PURCELL, *supra* note 19, at 220-21.

²⁵ *See id.* at 243, 252-53.

²⁶ *See* C. KELLER, *supra* note 21, at 3.

²⁷ *See id.* at 111, 145; R. PURCELL, *supra* note 19, at 32-33.

²⁸ W. SWEET, *RELIGION IN THE DEVELOPMENT OF AMERICAN CULTURE: 1765-1840*, at 200 (1952).

ture of man. This "improved" man, however, was still sinful and in need of God's grace, so that while the revivalist theology viewed man more sympathetically, he was not considered to be a perfectable being.

Rationalism also broadened consensus. Instead of following Puritan law, all law was subject to examination, explanation, and systemization. By 1789, Connecticut was using written reports of judicial opinions, the first American state to do so.²⁹ The written reports required the judge to base his opinions on logical argument instead of notions of customs and experience. The natural law was no longer sufficient to hold consensus, and rational law took its place. This new emphasis on logical systemization and argument was pioneered by Tapping Reeve and Zephania Swift.

II THE JUSTICE

A) *Tapping Reeve*

Tapping Reeve's contribution to Connecticut jurisprudence cannot be overstated. He established America's first formal law school in Litchfield, Connecticut. He published some of the earliest legal treatises on American law, and was Chief Justice of the Connecticut Supreme Court. He consistently attempted to articulate the law rationally and systematically. His articulation was a direct outgrowth of his theology, for he felt that the law was systemitized religious truth.

Reeve's jurisprudence can best be grasped by understanding as much of the man as is possible. First, his way of life will be examined, i.e. his lifestyle, his activities, his politics, and his theological orientation. His legal theory will be presented while simultaneously noting how that theory has theological orientation.

1) *Reeve's Way of Life*

Quite simply, Tapping Reeve's entire existence revolved around his religion:

Reeve's public and private life was under the domination of religion, a religion which was strengthened by the most sublime and comprehensive view of God, His character, law, gospel, and government in all its unerring rectitude and great results. . . . Reeve chose to live a religion which was ardent, but not given to open enthusiasm. The characteristic traits of his piety were arduous, constancy, humility, and gratitude.³⁰

Reeve's social humanitarianism was extensive. He was the President of the Connecticut Bible Society, whose purpose it was to send Bibles to the western frontier. He was vice-president of The Connecticut Society

²⁹ CIVIL HISTORY OF CONNECTICUT, *supra* note 9, at 143.

³⁰ E. SWANSON, TAPPING REEVE: AMERICAN LAW PIONEER 24 (1981).

for the Promotion of Good Morals, which was founded to further "moral" sermons and which inveighed against intemperancy. He was a close friend of the most prominent revivalist of the early nineteenth century, Lyman Beecher, and enthusiastically embraced Beecher's calls for greater humanitarian activities. In his personal life he was self-effacing, humble, and loyal. His personality was such that one of his law students wrote that "no instructor was ever more generally loved by his pupils."³¹ Yet Reeve's humility did not entail any wavering about the rightness of his faith or the wrongness of other faiths, as shown by his willingness to stand against members of his own family. His lifestyle was rather antipodal to that of his cosmopolitan brother-in-law, Aaron Burr, and Reeve spurned all of the former vice-president's attempts to contact him.³² It also has been suggested that Reeve's fierce piety was a reaction to the debacle of his father, a Presbyterian minister, who was dismissed by his congregation for perpetual drunkenness.³³

Whatever the reasons were, there is no doubt that Reeve clearly saw a difference between the righteousness of his faith and the darkness of the faith of others. Reeve said that those who were not members of his faith were "fellow sinners [who were] groping in the more than midnight gloom of heathen darkness."³⁴ Reeve, an ardent Federalist, denigrated the integrity of the Republicans by saying that they were not serious about their ideological beliefs, (meaning the desire for religious liberty) but merely were politically ambitious.³⁵ To Reeve, the Republican movement was an effort to prepare Connecticut for a revolution that would knife the heart of religious, governmental, and social being.³⁶

How could Reeve humbly live a life as the exemplary do-gooder and at the same time stubbornly reject the ways of life variant to his own, even to the point of completely misunderstanding Methodist, Episcopal, and Baptist desires for religious liberty? Politics and ethics, like laws, are important indicia of orientation, but politics and ethics understood as acts often do not illuminate the deeper, underlying forces that orient life. Thus, just as to understand the law we must delve into the way of life of the justice instead of confining ourselves to laws and traditional institutions of religion, so for the justice we must dig beneath politics and ethics to understand the way of life.

Tapping Reeve was not an innovative theologian, nor is there any

³¹ Boardman, *Sketches of the Early Lights of the Litchfield Bar* in P. KILBOURNE, *THE BENCH AND BAR OF LITCHFIELD COUNTY, 1709-1909* at 42.

³² M. LOMASK, *AARON BURR: THE CONSPIRACY AND YEARS OF EXILE, 1805-1836*, at 371 (1982).

³³ E. SWANSON, *supra* note 30, at 8, 24.

³⁴ Letter from Tapping Reeve to Sally Adams, *quoted in* E. SWANSON, *supra* note 30, at 24.

³⁵ T. REEVE, *THE SIXTH OF AUGUST* 4 (1968).

³⁶ *Id.*

hint that he ever desired or claimed to be one. Yet his theological statements, activities, and relationships tie him to three of the greatest theologians in New England history. He lived in the same town and was a friend of Lyman Beecher, he was allied with Yale President Timothy Dwight, and he was married to the granddaughter of Johnathan Edwards. These three men had enormous influence in Connecticut life from 1740 through 1830 by articulating and shaping the predominant intellectual theology to which Tapping Reeve so faithfully adhered.

The fundamental notions of this Connecticut Orthodoxy were that man was totally depraved and that God was totally powerful and good. The statements of these themes would vary. Edwards would insist that man was sinful because Adam's original sin was imputed to all men, an Augustinian notion, while Beecher accepted a Taylorist notion that man was sinful simply because each man sinned. There was a rejection of any Arminian tendency to argue that man somehow had a role in his own salvation. Man was depraved; whatever was good came from God, an idea that Reeve articulated in a letter in 1812 when he spoke of Connecticut education: "Our hands ought to rise in gratitude [to God] in an especial manner for the distinguishing pleasure of having our education under the sunshine of the gospel."³⁷ Reeve simply restated Puritan thought that if all good, including the government, came from God, then any attack on those "good" things was an attack on Reeve's God and had to be fought. Reeve believed in a somber, serious appropriation of God, an appropriation that the more charismatic Baptists and Methodists did not share. The Baptists and Methodists were passionate worshipers similar to the emotional worshipers during the Great Awakening. Reeve believed that "[p]assion, so far as it prevails, destroys reason, and when it gains entire ascendancy over men, it renders them bedlamites."³⁸

Thus Reeve's conception of God and his understanding of how man communicated with God drove him away from the religious dissenters who were a part of the Republican Party. Since the primary political question of the time was religious liberty and disestablishment, Reeve and the religious dissenters were squarely at odds. The political questions directly undermined Connecticut's (and Reeve's) God, government, religion, and society and it did so precisely because it was not simply political, but because it was a theological challenge.

Reeve thus found himself straddling two understandings of religion between which there was a tension. Anthropologically, liturgically, and politically there was a wide chasm between Reeve and the religious dissenters, a chasm that led him to oppose the idea of accepting religious

³⁷ E. SWANSON, *supra* note 30, at 24.

³⁸ T. REEVE, *supra* note 35, at 5.

pluralism. He could therefore be exclusive; he could shun Aaron Burr and his father and label the Republicans as selfish bedlamites. But the forces that attacked his religion were also forcing the religion to redefine itself in populist tendencies. Had there not been a pluralist society challenging the Congregational Church it is doubtful that a Lyman Beecher could have sparked a humanitarian movement. Thus Reeve was also a part of a religion that unconsciously but implicitly was accepting religious diversity. Reeve exemplified that by his humanitarian activities, and through the method that he brought to jurisprudence.

2) *Reeve's Theology in the Legal Field*

The single most important aspect of Tapping Reeve's theory of law was that it was religious. Justice Samuel Church, who would follow Reeve as Connecticut's Chief Justice in 1847, said that Reeve "loved the law as a science, and studied it philosophically. He considered it as the practical application of religious principles to the business affairs of life. He wished to reduce it to a certain symmetrical system of moral truth."³⁹

What Reeve did was to take his and Connecticut's religious experience, which was an experience encompassing the totality of life, and give it a structured, systematic, rational expression. Essentially Reeve was creating a "scientific jurisprudence" by making the law rationally structured and, in a sense, objective. The law was not objective because it was politically or cosmologically neutral—an impossible status—but because it reached a centrality of consensus among Connecticut's new diversity. While the Connecticut religious landscape was no longer simply Congregational, and while the Enlightenment had stimulated Arminianism, all of the denominations were still Calvinist. Reeve basically introduced a Calvinist, systematic jurisprudence, a stage that conformed to Jacques Ellul's stage three in which the law is rationally articulated and systematically synthesized as part of an intellectual, political, and jurisprudential theory. In Puritan Connecticut, the judge was trusted because he was the interpreter of the will of God. Now the judge would be trusted because he could articulate the reasons for a decision in a logic independent of Congregational orthodox faith.

Reeve introduced "scientific jurisprudence" in three ways. The most dramatic was his opening of the Litchfield Law School, the first of its kind in the nation. There, students underwent a systematic, formal training in the law. Second, Reeve wrote several of the earliest American legal treatises in which he surveyed the entire field of law, enunciated the governing principles of the area, and derived applications from the principles. Finally, he wrote his judicial opinions, a relatively new exercise in

³⁹ S. CHURCH, LITCHFIELD COUNTY CENTENNIAL CELEBRATION, 54 (1968).

American courts. In his opinions, Reeve insisted upon a strict adherence to the use of proper forms and suits.

Much of Reeve's jurisprudence seems absolutely dull, since there is nothing that strikes the modern eye as either innovative or excessively arcane. For instance, in *Sacket v. Mead*,⁴⁰ the defendant was the administrator of an insolvent estate. The creditors had been paid off to the extent possible and the statute of limitations for their further payment had run.⁴¹ The defendant then showed some other estate property to the plaintiff who was also a creditor of the estate.⁴² Under the applicable statute, once the statute of limitations had run, the creditors could not receive further payments unless they could show further estate property.⁴³ The plaintiff claimed that he had done so, but also claimed that he was entitled to have his claim fully satisfied to the exclusion of the other creditors.⁴⁴

Reeve refused to allow the creditor to recover his full payment because such payment defeated the principle of average.⁴⁵ Reeve found the principle in the applicable statute and insisted that if any distribution was made, it had to be made in shares to all the creditors.⁴⁶ Furthermore, Reeve would not allow a suit until the commissioners who would have been appointed to oversee the administration of an insolvent estate had met to strike this particular estate average.⁴⁷ Reeve said that the plaintiff could maintain a suit on the defendant's probate bond, and then the proceeds of the bond would be distributed fairly to the creditors.⁴⁸

In his adjudication of *Sacket*, Reeve relied on the principle of average, on the necessity to bring a suit on the defendant's probate bond instead of a suit against the estate for prompt distribution, and on the tradition of deferring to the legislature. None of this was scriptural, nor was it innovative; all was a continuation of the Puritan past. Because it was an open and logical presentation of the past, however, it was socially acceptable. Reeve was far too committed to his Puritan past, liturgically and legally, to alter that past. The method he chose to articulate the past, through humanitarian activity and scientific jurisprudence was a method broader than used in the past. A hint to the humanitarian aspect of Reeve comes through in *Grumon v. Raymond*.⁴⁹

⁴⁰ 1 Conn. 13 (1814).

⁴¹ *Id.* at 16.

⁴² *Id.*

⁴³ *Id.* at 15 n.a.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.*

⁴⁷ *Id.* at 28.

⁴⁸ *Id.* at 30.

⁴⁹ 1 Conn. 39 (1814).

In *Grumon*, the justice of the peace of Fairfield County issued a search warrant for stolen goods. The warrant authorized the sheriff to "search . . . suspected places, houses, stores or barns in said (town of) Wilton" ⁵⁰ Sheriff Betts falsely arrested Grumon and four others. ⁵¹ Grumon sued for trespass *vi et armis*. ⁵² The defendant justice of the peace argued that he was immune from suit since he was acting in his judicial capacity. ⁵³ He also argued that while he might have erred in his issuance of the warrant, it was not an irregular process. ⁵⁴ The justice further contended that the only person that was actually liable was the person who made the arrest, the sheriff. ⁵⁵

The court held that the justice of the peace was liable for the issuance of a general warrant. ⁵⁶ Reeve said that there were several requisites for a proper search warrant, among them being that the stolen articles were in a specific place. ⁵⁷ Reeve concluded that a justice was not liable if he issued a warrant that was recognized but was invalid because of some mistake, ⁵⁸ however when a judge issued a warrant that the law did not recognize, as was the case in *Grumon*, then the justice was potentially liable. ⁵⁹

Besides imposing a burden of care on justices of the peace, thereby making them subservient to the processes of the law, the *Grumon* opinion respects the individual. An individual could not be subjected to harassment from governmental officials because the individual himself was worthy of protection. The restraint of governmental power was not dependent upon revivalist humanitarianism for its existence. Puritan Connecticut would probably have nodded its approval of Reeve's reasoning and result. But the fact that the reasoning was now publicly articulated in written form broadened its acceptance beyond Puritan boundaries. Reeve consistently followed his *Grumon* and *Sacket* approach of presenting Puritan law through broader methodology.

In Reeve's *The Law of Baron and Femme*, ⁶⁰ he again revealed the importance of his Puritan past. In stating that "few maxims of our law are more important, than that of *stare decisis*," ⁶¹ Reeve showed his ven-

⁵⁰ *Id.* at 40.

⁵¹ *Id.* at 41.

⁵² *Id.* at 39.

⁵³ *Id.* at 41.

⁵⁴ *Id.*

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 44.

⁵⁷ *Id.* at 45.

⁵⁸ *Id.* at 44.

⁵⁹ *See id.* at 45.

⁶⁰ T. REEVE, *THE LAW OF BARON AND FEMME* (1816).

⁶¹ *Id.* at 33.

eration of the past. For Reeve, the past entailed no separation of law from religion. His treatise shows this intertwining more explicitly than his opinions. For instance, Reeve said that parents had the duty to provide "instruction of them [children] in reading their own language, so as to be able . . . to search the scripture . . . and . . . learn the revealed will of God."⁶² This instruction was necessary to teach the children the capital offenses of the state. Reeve discerned that it was part of the law to teach children to learn scripture, and scripture was necessary to understand the law. Understanding the Bible was also important in discerning Connecticut matrimonial law, since "all marriages forbidden by God's law or within the Levitical degrees of kindred are invalid."⁶³

Reeve did not view theology and law as distinct principles. He was primarily interested in articulating them consonant with his religious/legal moorings. However, his way of life had already begun to move away from the Puritan orthodoxy because of the new religious pluralism. Thus, the method Reeve used to live out his theology was a method that had interdenominational appeal both in religious humanitarian endeavors and in legal scientific jurisprudence. Tapping Reeve had simply grown with his religious environment.

B. Zephania Swift

Zephania Swift was probably the most influential person in Connecticut law. He wrote the first legal treatises in the United States that were enormously influential even outside the United States. While in the United States House of Representatives, he wrote his first treatise, *A System of The Laws of the State of Connecticut*.⁶⁴ In 1810, he wrote his *Digest of the Laws of Evidence*.⁶⁵ He was appointed to the Supreme Court and was thereafter elected to Chief Justice, replacing Tapping Reeve. After retiring from the Supreme Court, Swift wrote his *Digest of the Laws of Connecticut*.⁶⁶ He died in 1823.⁶⁷

Swift rationally systematized everything. Theologically, he insisted upon a rational deism free from ecclesiastical rigidity, open to religious pluralism, and based upon a very structured, ordered universe. Jurisprudentially, he also stressed finding central principles and a systematic application of those principles.

⁶² *Id.* at 286-287.

⁶³ *Id.* at 202.

⁶⁴ Z. SWIFT, *A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* (1795).

⁶⁵ Z. SWIFT, *A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES* (1810).

⁶⁶ Z. SWIFT, *DIGEST OF THE LAWS OF CONNECTICUT* (1815).

⁶⁷ See *CIVIL HISTORY IN CONNECTICUT*, *supra* note 9, at 177

1) *Swift's Way of Life*

In sketching Tapping Reeve's life, it was most convenient to first appreciate Reeve's deed and then proceed to his stated thoughts concerning religion. The crux of Reeve's theology was in his actions. The crux of Swift's theology was in his words, a statement which in no way is designed to disparage his religion. Swift simply took the time to detail his theology publicly. The logical starting point for Swift, therefore, is his expressed theology.

Swift's theology was less rigid than Reeve's. Reeve basically embraced Puritan theology as modified by the revivals. Swift's theology was also shaped by the revivals' humanitarian spirit, but was strongly shaped by the rationalism of the Enlightenment as well. These twin influences shaped Swift into a deist, but a deist who refuted the ideas of many contemporary deists such as Thomas Paine. Interestingly, Swift's theology bore a character remarkably similar to the theology of John Calvin. Swift said that he was a follower of Christ and was "desirous only to strip his gospel of the conventional additions of ecclesiasticism, and show it divine in form, as it originally stood."⁶⁸

Opposing some contemporary rationalists, Swift first established that there indeed was a God. Swift felt that any rational person had to believe in God: "[t]he being of God is so universally impressed on the human mind, that it seems unnecessary to guard against a denial of it by human laws. Atheism is too cold and comfortless to be a subject of popular belief."⁶⁹ Swift's language is similar to Calvin's reasoning for the knowledge of God. Calvin stated that:

[t]here exists in the human mind, and indeed by natural instinct, some sense of Deity, we hold to be beyond dispute, since God himself, to prevent any man from pretending ignorance, has endued all men with some idea of his Godhead . . . [T]here is no nation so barbarous, no race so brutish, as not to be imbued with the conviction that there is a God.⁷⁰

In both statements, there was a strong belief that one believes in God simply because it was a natural, rational thing for humans to do. The utility of this basic method of proof of God was that it allowed constant appeal to reason for ethical and ecclesiastical theory because it was through reason that humans became aware of God.

Swift rejected the idea of a vindictive God who often was presented in sermons of "fire and brimstone," but thought of God as "a kind par-

⁶⁸ Baldwin, *Zephania Swift in William Draper Lewis, ed.*, 2 GREAT AMERICAN LAWYERS 108 (W. Lewis ed. 1907).

⁶⁹ 2 Z. SWIFT, *supra* note 64 at 322.

⁷⁰ 1 J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 43 (H. Beveridge trans. 1953).

ent.”⁷¹ This description of God rings of Calvin, who said that by accepting Christ, one of the resulting benefits for Christians was that God was transformed from a judge into an indulgent father.⁷²

Not only did Swift display the idea of a vindictive God, he also distanced God from everyday life. The most revealing way he did this was through the name he gave to God. Swift used amorphous terms such as “Supreme Deity” and “Supreme Character” to name God. His names were indicative of a deism that recognized God as a creator, but not as a closely personal God. Swift needed some way to describe the connection between God and humanity for if he left his theology as it has been described so far, humans would have little need to consider an aloof, amorphous God. Swift’s link was logical reason.

Logical reason structured Swift’s cosmology, his scriptural interpretation, his philosophy of Christianity, and his ethics. Cosmologically, the world was a rationally structured system. He said that the “Supreme Deity”:

has created innumerable systems of worlds - peopled them with an infinite variety of inhabitants, and governs by general and immutable laws - that in universal nature, he has established the best possible system for the general good . . . this world is but a small part of the great plan . . . [and] this life is but a commencement of an existence which shall never end.⁷³

Scripturally, he interpreted the Bible so it was consistent with reason. Swift said that “certainly no construction should be put on the language of our Savior, that would make him promulgate a doctrine wholly inconsistent with reason and justice.”⁷⁴ Swift also said that Christianity was nothing more than reason and common sense since “[i]n its uncorrupted state, Christianity is unquestionably, not only consistent with, but founded on the dictates of reason and common sense.”⁷⁵ He objected to a church-centered religion and a church centered state. He thought that the clergy had overstepped its proper role, even beyond the excesses of the Roman Church.⁷⁶ He felt that the Congregational Church had assumed too much power, power which had corrupted Christianity. Thus, Swift was not a supporter of the religious predominance of the Puritans and fully accepted Connecticut’s religious diversity. He believed that the practical application of religion was much more important than proofs of the absolute rightness of any one denomination. Swift’s desire for practical application of religion placed him in step with the humanitarian reviv-

⁷¹ Z. SWIFT, *THE CORRESPONDENTS* 130 (1810).

⁷² 2 J. CALVIN *supra* note 70 at 37.

⁷³ Z. SWIFT, *supra* note 71, at 129-30.

⁷⁴ Z. SWIFT, *supra* note 66, at 24-25.

⁷⁵ Z. SWIFT, *supra* note 71, at 119.

⁷⁶ *Id.* at 17.

als. For Swift, Christian ethics were based on the example of the Good Samaritan:

[w]hat doctrine can be more sublime and worthy the divine character of our Savior, than to teach us the duty to exercise humanity and compassion to all that are in distress, without regard to sect, religion, or nation. Yet, how many people may be found among them who call themselves Christians, who think there is more merit in making one long prayer, than in the noble exercise of humanity as in the case of the Samaritan.⁷⁷

Thus, Swift wanted an ethical way that was true to Christianity, but which transcended denominationalism. He wanted a church that was true to Christianity and not obsessed with power, prestige, or ultimate predominance. The way to do this was to use reason, to describe and to interpret scripture, and to understand Christianity itself. His method was that of a rationalist who accepted religious pluralism and who rejected Puritan hegemony. It was a method which transcended denominationalism. Most of all, it was a method based on the same structured rationality that Swift would implement in his jurisprudence.

2) *Swift's Theology in the Legal Field*

a) The Role of the Supreme Court

Given Swift's perspective of rational structure, it is not surprising that he was insistent upon the proper understanding of the role of the Connecticut Supreme Court. In fact, Swift said that the most painful occurrence of his life involved a dispute over the definition of the role of the supreme court.⁷⁸ Because it was such an important event, and since it reveals some of Swift's governmental presuppositions, the story of the Peter Lung trial is worth relating.

Lung was accused of murdering his wife. The Superior Court was not in session, so Swift ordered a special court session although he had no explicit statutory authority to do so.⁷⁹ Swift thought that he had to convene the court immediately to prevent witness tampering, because one of the witnesses was near death, and because he simply desired to conduct a speedy trial. Lung's counsel did not object to the special court and Lung was convicted of murder.⁸⁰ The community then felt compassion for Lung, and his case was appealed to the legislature. The legislature, viewing the proceeding as extrajudicial and void, annulled the action of

⁷⁷ *Id.* at 125.

⁷⁸ Z. SWIFT, VINDICATION OF THE CALLING OF THE SPECIAL SUPERIOR COURT . . . FOR THE TRIAL OF PETER LUNG 5 (1816).

⁷⁹ Lung's Case, 1 Conn. 428, 428 (1815).

⁸⁰ *Id.*

Swift's court.⁸¹ Swift said that if he had convened the court improperly, with a resulting death sentence, that he had committed a criminal act.⁸²

Swift had four arguments against the Assembly's action. He cited a statute that allowed the Chief Justice to call a special court on "extraordinary circumstances." He appealed to common sense. He claimed that previous chief justices also had convened a special court. Finally, he said that Lung did not ask for a new trial, which the legislature gave to him, but for a pardon.⁸³

Swift gave several reasons why it was a mistake to allow the legislature to interfere with the judiciary. He first cited the experience of judges: "judges have formed opinions on the whole science of jurisprudence, and heretofore it has been understood that the more law learning a man had, the better qualified he was to be a judge."⁸⁴ He also said the power assumed by the legislature gave it the discretion to overturn any court, a power which could be used for evil by corrupt men. The only restraint on the legislature, moral sentiment, was not enough. Allowing the legislature to interfere with the judiciary would lead to uncertainty, endless appeal, and was an invitation to despotism because the legislature was unrestrained by legal principles and vulnerable to being duped.⁸⁵

Instead of allowing ultimate appeal to the legislature, Swift thought that "the tribunal of dernier resort should be composed of men qualified by their integrity, talents, science, and experience . . . and should be rendered independent of popular whim and clamour."⁸⁶ Swift said that judicial independence was "essential to the due and impartial administration of justice."⁸⁷

The Peter Lung controversy revealed Swift's concern for having carefully defined governmental function, but it more deeply revealed some preconceptions that were not historically valid. Swift's complaint of legislative interference in judicial functioning assumed that the legislative and judicial branches were separate and ignored the fact that the Fundamental Orders made them indivisible. Because the legislature had delegated judicial authority to the court, the supreme court had developed an image of itself as the court of last appeal, an image which correlated with the American Federal system. Swift was not able to implement his theological and jurisprudential rationalism efficaciously if the court was not properly structured as independent, but that independence was not envisioned by

⁸¹ Z. SWIFT, *supra* note 78, at 4-21.

⁸² *Id.* at 22-24.

⁸³ *Id.* at 27-34.

⁸⁴ *Id.* at 37.

⁸⁵ *Id.* at 39-48.

⁸⁶ *Id.* at 40.

⁸⁷ *Id.* at 45.

the Fundamental Orders.

b) Swift's Theory of the Law in Treatises and Cases

The nature of law was spelled out in Swift's *Digest of the Laws of the State of Connecticut*:

The science of the law is grounded on certain first principles of existing in the nature and fitness of things. These have been introduced by the statutes of the legislature, or have been derived from the dictates of reason - from considerations of policy - from the excellent maxim of civil law, to live virtuously, injure nobody and to render every man his due - and from the sublime precept of Christian morality, to do to others as we would they should do to us.⁸⁸

In Swift's system, the world was part of a greater divine, universal system. Within this world, law was founded on the nature of things and expressed in several sources. Swift attempted to discover these universal principles, principles that were religious because of their place in Swift's cosmology. He then attempted to apply those principles to the particular circumstances of the case.

*Chapman v. Gillet*⁸⁹ and *Fox v. Abel*⁹⁰ display the explicit interrelationship between religion and law in Swift's Connecticut. In *Chapman*, Chapman had given testimony before a meeting of a Presbyterian Church.⁹¹ Gillet charged that Chapman had committed perjury.⁹² Chapman sued Gillet for defamation of character and claimed that the words charging perjury were themselves actionable.⁹³ Chapman's oath had been administered by a justice of the peace.

Swift held that the words were actionable because alleging a perjury at a church meeting was the same as alleging a perjury at any other judicial forum.⁹⁴ Swift stated that ecclesiastical tribunals were "necessary, not only for the promotion of religion, but for the peace and well-being of . . . society."⁹⁵ Ecclesiastical tribunals "may be said to be courts where justice is judicially administered."⁹⁶ Swift said that to find justice, a tribunal must be empowered to administer an oath, and then he extended the rules of actionable slander to include ecclesiastical tribunals: "[i]t has been decided in this Court, that to charge a man with perjury before arbi-

⁸⁸ Z. SWIFT, *supra* note 66, at 10.

⁸⁹ 2 Conn. 40 (1816).

⁹⁰ 2 Conn. 541 (1818).

⁹¹ 2 Conn. at 41.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 44.

⁹⁵ *Id.* at 43.

⁹⁶ *Id.* at 43-44.

trators, is actionable slander; and now by analogy, we extend the same principle to ecclesiastical tribunals."⁹⁷

For a man who excoriated the influence of the church in government, such a broad extension of authority to an ecclesiastical body is curious. While Swift did not want a clergy-dominated state, he was apparently willing and anxious to have the churches share in the administration of government. If he had wanted religion completely out of government, it would have been quite easy for him to refuse to extend the rule of actionable slander, but his opinions reveal unwillingness to separate Christianity from government. In the first sentence of the *Chapman* opinion, he declared, "*Christianity is a part of the law of the land.*"⁹⁸

Swift wanted a continuation of the past, and thus sanctioned religious tribunals. But the approach he used was systematic law. He kept law in its Christian context, but pushed the methodology toward Ellul's stage three in which jurists attempt to systematize the law.

In *Fox*, the court was called upon to determine the length of the Sabbath.⁹⁹ The Constable (Abel) arrested Fox on the morning of a Sunday, but before dawn.¹⁰⁰ A statute prohibited arrests on Sunday. Fox sued Abel for trespass *vi et armis*,¹⁰¹ compelling the court to decide what time period was meant by "Sabbath."¹⁰²

Many of the judges wrote opinions on the issue. Swift thought that the Sabbath included more than the solar day, which would enable Fox to enforce the statute and sue Abel.¹⁰³ Swift based his opinion on Blackstone's Commentaries and English law, which described the contours of a day generally.¹⁰⁴ The other justices took a variety of approaches.¹⁰⁵ Trumbull immediately cited Leviticus, Matthew, and Mark. Smith thought that only the statute should be examined, not scripture, England, or the common law.¹⁰⁶ Brainard based his decision on the Decalogue and Christianity's interpretation of the statute.¹⁰⁷ Hosmer relied on what he believed was normal Christian usage.¹⁰⁸

Just as Swift objected to theological hairsplitting among churches so he avoided a religious debate in *Fox*. Instead of making a Puritan move to

⁹⁷ *Id.* at 45.

⁹⁸ *Id.* at 43.

⁹⁹ 2 Conn. at 542.

¹⁰⁰ *Id.* 541.

¹⁰¹ *See id.*

¹⁰² *Id.* at 542.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 542-43.

¹⁰⁵ *Id.* at 545-46.

¹⁰⁶ *Id.* at 553.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 557.

appeal to scripture, he appealed to secular treatises. *Fox* shows that the same judge who in *Chapman* incorporated Christianity into law and government insisted upon adjudicating a case on a systematic method. The methodology had become broader than scriptural interpretation just as Connecticut religion had become broader than a single denomination.

The interface of religion and law can also be seen in Swift's treatment of crimes against religion. Swift believed that the "Supreme Deity" was perfectly capable of avenging his holy law without help from the judiciary. Crimes against religion could be punished only when they simultaneously offended religion and the "happiness of civil society."¹⁰⁹ There was a tension in this philosophy, however, because what offended the "happiness of civil society" was dependent upon the level of theological unanimity in the state. Thus punishable crimes such as blasphemy, atheism, polytheism, Unitarianism and profane swearing, were crimes only because Connecticut was still a religious state. Heresey and Judaism were not punishable due in large measure to the tolerance of religious diversity.

This tension is also seen in Swift's consideration of oaths. Swift said that the oath was based on "a moral obligation to speak the truth, enforced by remorse of conscience for violation of it [and] belief in the existence of God, and future rewards and punishments."¹¹⁰ Thus, as long as one recognized obligations of an oath to tell the truth and understood the transcendental results of the failure to tell the truth, one could be a witness.

Swift also said that what a person believed and said about an oath and its underlying bases was not hearsay, but a simple fact. If a person disbelieved in the transcendental effects of lying, his statements could be used as facts to undermine his credibility as a witness. But a man could not be forced to reveal his opinions about God in court.¹¹¹

Swift left the oath question in a quandry. If a person kept his mouth shut about his beliefs, then his beliefs could not be questioned and he could be a witness. However, if the witness had made any statement that showed disbelief in either the obligation to tell the truth or of the transcendental effects of the failure to tell the truth, he could be dismissed. This was a very restrictive understanding of freedom of speech and religion. Swift effectively safeguarded religious expression provided it agreed with his theology. Swift differed from the Puritans only in the degree to which he allowed religious freedom.

Swift's conception of all religious elements was that of an ordered reason and that reason was the tool Swift used to shape his life, particu-

¹⁰⁹ Z. SWIFT, *supra* note 64, at 320.

¹¹⁰ Z. SWIFT, *supra* note 78, at 47.

¹¹¹ *Id.* at 49.

larly his jurisprudence. His acceptance of diversity and the humanitarian spirit also led him to an insistence upon Christian ethics devoid of sectarian competition. His entire theology was one which transcended denominationalism, but which remained Christian.

In taking law toward scientific jurisprudence, Swift went a step beyond Reeve. Reeve trusted the religious monopoly of the Congregationalist and was more willing to turn to scripture to support his treatise law. He followed the forces of religious pluralism to emphasize scientific law and humanitarianism, but he did not fully support diversity. Swift's way of life fully supported diversity and rationalism, and not coincidentally he more fully developed his scientific jurisprudence. There was a direct relationship between the acceptance of pluralism and the development of scientific law. Yet, even Swift was unable to break completely from the natural law of the past.

After Swift, the Connecticut jurisprudence was delicately poised between its inherited natural law and its scientific law. While the overwhelming Christian/Calvinist nature of Connecticut prevented Reeve and Swift from dissociating religion from law, the pluralism also drove the law to the unifying scientific jurisprudence. Connecticut law was scientific within a Calvinist context.

III TOWARD A THEOLOGICAL THEORY OF JURISPRUDENCE

Every human activity is a reflection of the person's orientation. From the routine to the abstract, each act rests upon an enormous number of assumptions that have been internalized by society and the individual. Lawmaking is not different and therefore much of jurisprudence can be enlightened by understanding the assumptions and philosophies upon which the judge's orientation was based.

This Article has attempted to understand the assumptions and philosophies of Connecticut law by focusing on two Supreme Court justices, Tapping Reeve and Zephania Swift. Both adjudicated in a climate of transition from monolithic Puritanism to pluralistic Calvinism. Because of the religious tensions of the day, they sought to bring a legitimate method of dispute resolution to the court. For both men, that method was scientific jurisprudence, which itself was centered on man's ability to reason, which was a direct expression of their theologies. The transformation of Connecticut law was reflective of, and dependent upon, the religious developments of pluralism, rationalism, and humanitarianism in Connecticut society.

The ability of religion to be an effective tool for understanding jurisprudence raises a host of opportunities for legal and religious scholarship. What effect did religious diversity have on the legal actions of other states? How have our definitions of religion been limited by too conven-

ient distinctions? How did economics affect religion, and what way did they combine to affect jurisprudence? These are but a tiny few of the potential avenues for discussion.

In developing this method, scholars should not ignore analysis of lower level judges and legislators, but at the same time, they must take care not to lump all of those magistrates into stereotypical groups. A great effort should be made to understand fully the individual judge. Judges who were not as active in the forefront of theological movements as Swift and Reeve were, should also be analyzed.

The potential for this area is enormous. Scholars should not fear that religion and law have nothing to say about each other. Both disciplines must come to grips with methods of dispute resolution, a reality that is inevitable based upon assumptions of human existence. To prevent either discipline from being interpreted by the other is to waste a valuable opportunity for each to understand itself. To ignore that the two together shape jurisprudence is to ignore history and reality.